

No. 12371.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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F. E. THIBODO,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLANT'S SUPPLEMENTAL BRIEF.

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## TOPICAL INDEX

	PAGE
Introduction .....	1
There was no service of process on any trustee of appellant's interests which in the slightest degree affected his rights.....	2
Even the City Treasurer is not a trustee for the holders of the bonds in the sense that he is allowed to represent them in any case involving their rights of property.....	3
A further discussion of proceedings in rem, or quasi in rem.....	4
Conclusion .....	5

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Follette v. Pac. L. & P. Corp., 189 Cal. 193, 208 Pac. 295.....	4
Fox v. Pasadena, 78 F. 2d 948.....	2

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### Introduction.

We have already shown that by statutory enactment the appellant's bonds constitute a record interest in real property, which, with respect to notice to the world is tantamount to any other record interest. We have also called attention to the interpretation of this statute by the Supreme Court of California. We think this clearly establishes that the finding of the trial court in this action that such bonds afford no notice to the Federal Government is contrary to law. Upon that erroneous finding primarily rests the judgment from which we have appealed.

There Was No Service of Process on Any Trustee of Appellant's Interests Which in the Slightest Degree Affected His Rights.

The Government does not contend that the City Treasurer of National City who was directed under the law to collect and disburse the bond funds was ever served with process. They do however assert that the City of National City, as a municipal corporation, was served, and that such City is a statutory trustee with relation to plaintiff's bonds, and as such is entitled to appear and act for him, and bind his interests. The United States Court of Appeals, for the Ninth Circuit, in *Fox v. Pasadena*, 78 F. 2d 948, has rejected this contention. The Court there says:

"The basic error in the complaint is the assumption that the City is a trustee for the taxpayers of the District. The fact that the officers of the City act *ex-officio* for and on behalf of the District. They, not the City, are the trustees named by the statute."

Under the Improvement Act of 1911 all matters relating to the bonds and the bond fund are matters entrusted to the City Treasurer in a special capacity distinct from his general official duties. It is of no concern to the City as a municipality. No doubt the preservation of the fund against misuse by the City Treasurer, and a recoupment in such case against the City Treasurer's bondsmen would fall within the domain of the municipality.

**Even the City Treasurer Is Not a Trustee for the Holders of the Bonds in the Sense That He Is Allowed to Represent Them in Any Case Involving Their Rights of Property.**

Since there is no contention that the City Treasurer was made a party to the condemnation action, this question cannot become one of the issues of the case at bar. A discussion of it will nevertheless throw some light upon the general subject.

We do not believe that the City Treasurer, even had he been properly brought into the condemnation action, would have possessed any authority, directly or inferentially, to appear on behalf of the bond owners. The powers of all trustees, and especially statutory trustees, cannot exceed the power reposed. The power accorded by the statute is to collect from the property owner and disburse the collection to the bond owner, and nothing more. He cannot manage, sell or deal with the property.

The purpose of a condemnation action is to ascertain the value of specific property and to pay over that value as an incident to the exercise of the power of eminent domain. A proper defense entails the right and power to make use of the incidents of ownership. The City Treasurer has neither legal title to the bonds, dominion over them, nor tangible evidence thereof. He cannot in fact foreclose a bond without the direction of the owner. It is as untenable to suggest that he has a right to represent the bondholder in a condemnation action as it would be to assert that he has the power to represent the fee owner of the land on which the bond is a lien. If, in the construction of any trust, a trustee is totally without the right to exercise a particular power of his own volition, then such power cannot be involuntarily thrust upon him.

## A Further Discussion of Proceedings in Rem, or Quasi in Rem.

This is merely the doctrine of process directed against the thing involved in the action, or as against the thing in connection with a proceeding against the person. Always present is the enveloping shadow of the Fifth Amendment to the Constitution commanding that there be due process of law. In short there still must be such substantial substituted process as is reasonably capable of affording notice to the interests affected, and at the same time guarantee to them their day in court.

When, as in this case, Congress has directed a condemnation action to be brought against the persons having interests of record and those interests manifested by possession, with its appropriate declaration of taking, the mode so provided becomes the measure of the power, and a judgment in disregard of it has no binding force. A similar situation arose in *Follette v. Pac. L. & P. Corp.*, 189 Cal. 193, 208 Pac. 295, being an action in connection with the Land Title Act (Torrens Title). There the Court, quoting from an earlier decision, said:

“It is no doubt true that so far as substituted service upon a class of unknown claimants is permitted at all in proceedings which are merely *quasi in rem*, it rests upon the ground of necessity and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in cases which sustain the power to bind unknown owners by substituted service in actions of the character now under consideration.”



And again:

“The evident purpose of the act is to secure so far as possible actual notice of the proceedings to all known claimants by personal service if they reside and can be found within the state; by mailing if they cannot so be found or are nonresidents. We have no doubt that where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to wilfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. . . . We are satisfied that the statute in question imposes upon the party seeking to proceed under it the duty of inquiry as to the names and residences of all persons who may claim an adverse interest in the property. . . . So construed the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law.”

The decision is a very well-considered discussion, citing many decisions from other jurisdictions, and proceeds to hold that “due process of law” is not met when there is a failure to observe these principles.

### **Conclusion.**

We have heretofore declared that the arguments of the defense with respect to the plaintiff herein having been represented by a trustee in the condemnation action are without any supporting record (page 4, Appellant’s reply brief). We also suggested that if the record be important it should be transmitted. It may well be important in overcoming the arguments of government counsel which relate to matters unsupported by the record. We

suggest that it will disclose that the judgment in the condemnation action was entered in response to a stipulation between the Government and the owners of the land to which appellants bonds attached; that this very stipulation recognized the existence of the outstanding assessments and the existence of the obligation of those assessments.

Finally we submit that due process of law, as applied to condemnation, means a proceeding in accord with the authorization therefore, a proceeding that is based on proper notice and process, and one that affords an opportunity for a proper hearing in adherence to those rules and principles established in our system of jurisprudence for the protection of private rights. Under the trial court's findings [Tr. p. 21] it is determined that no such process, notice or hearing is essential; indeed it is in effect further declared that had this appellant appeared he would not have been entitled to be heard in the matter of the just compensation for the property taken. This appellant owned an interest constituting part of the property taken. His bonds, being a first lien under the law, were the very pinnacle of the aggregate property right.

Respectfully submitted,

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